United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C.

NOTICE: This is an electronic bench opinion which has not been verified as official.

Date: February 2, 1998

Case No. 97 INA 209

In the Matter of:

SUSAN SACKS,
Employer,

On behalf of:

ANNA GOSZCZYNSKA KSIAZEK,
Alien

Appearance: R. A. Vrhovc, New York, New York

Before : Huddleston, Lawson, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of ANNA GOSZCZYNSKA KSIAZEK (Alien) by SUSAN SACKS (Employer) under § 212(a)(14) (A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(14) (A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer requested review pursuant to 20 CFR § 656.26.[1]

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

Statutory Authority. Under § 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability at that time and place.[2]

STATEMENT OF THE CASE

On May 30, 1995, Employer applied for labor certification to permit it to employ the Alien on a permanent basis as a "Houseworker, General", to perform the following duties in her home:

- Care for 2 children aged 4 and one
- involves preparing meals, feeding, bathing, toilet training, changing
- laundry
- running errands, such as food shopping, hardware store, post office.
- involves household consisting of 2 adults and 2 children

The work week was forty hours from 9:00 AM to 6:00 PM with no overtime at the rate of $9.22 per hour. The position was classified as "Houseworker,Gen.," under DOT Code No. 301.474-010.[3] The application (ETA 750A) stated a education requirements the completion of high school, and further required that applicants have three months of experience in the Job Offered.[4] Although four U. S. workers applied after the job was advertised and their resumes were referred to the Employer, none of them was hired.

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

[3]**301.474-010 HOUSE WORKER, GENERAL** (domestic ser.) alternate titles: housekeeper, home. Performs any combination of following duties to maintain private home clean and orderly, to cook and serve meals, and to render personal services to family members: Plans meals and purchases foodstuffs and household supplies. Prepares and cooks vegetables, meats, and other foods according to employer's instructions or following own methods. Serves meals and refreshments. Washes dishes and cleans silverware. Oversees activities of children, assisting them in dressing and bathing. Cleans furnishings, floors, and windows, using vacuum cleaner, mops, broom, cloths, and cleaning solutions. Changes linens and makes beds. Washes linens and other garments by hand or machine, and mends and irons clothing, linens, and other household articles, using hand iron or electric ironer. Answers telephone and doorbell. Feeds pets. GOE: 05.12.18 STRENGTH: M GED: R3 M2 L2 SVP: 3 DLU: 86

[4]The experience requirement was amended as of September 30, 1995.

Notice of Findings. In the Notice of Findings (NOF) issued July 6, 1996, the CO denied certification subject to rebuttal. AF 54-57. The NOF said at least three apparently qualified U. S. workers had applied, including Ms. Egoavil, Ms. Stewart, and Ms. Gabriel. Subject to rebuttal, the CO concluded that all of the U. S. workers were rejected for reasons that were neither lawful nor job related, citing 20 CFR §§ 656.20(c)(8), 656.21(b)(6), 656.21 (j), and 656.24 (b)(2)(ii). AF 55-56. As all of these applicants said the Employer failed to contact them for job interviews, it appears that they were rejected on the basis of their resumes, only. The CO directed the Employer to clarify the assertions of these applicants by documenting all contacts and the reasons each of them was rejected.

Rebuttal. The Employer's rebuttal of July 30, 1996, said that she had attempted to call Ms. Egoavil at the number given in the resume but failed to reach her. She was successful in reaching Ms. Stewart and Ms. Gabriel, both of whom she interviewed over the telephone and rejected for the reasons stated in her rebuttal letter. AF 62-63.

Final Determination. On August 14, 1996, the CO issued a Final Determination denying certification on the grounds that the Employer's evidence failed to establish the details of her recruitment effort, that she rejected the qualifications of apparently qualified U. S. workers, and that she failed to prove that the job was clearly open to any qualified U.S. worker or that the U. S. workers were rejected for reasons that were lawful and job related.

Reviewing the rebuttal, the CO accepted the reasons for rejecting Ms. Gabriel, but said the circumstances under which she rejected Ms. Egoavil and Ms. Stewart remained at issue. As to both candidates, the CO concluded that the Employer's assertions could not be verified by the evidence of record and rejected her application for alien labor certification on behalf of the Alien.

Appeal. On September 11, 1996, the Employer appealed.[5] As to Ms. Stewart, the Employer reiterated that she had contacted the job applicant, contending that her rebuttal and other reports of the asserted telephone interview incorporated information about the applicant that the Employer could only have learned in a conversation with this applicant. Employer did not deny that she had failed to reach Ms. Egoavil, however. Employer argued that she should not have been expected to write this candidate a letter after having failed to reach her at the telephone number provided in the resume. Employer then concluded by contending that she had acted in good faith in the recruitment process.

DISCUSSION

It is well-established that a reasonable effort to contact an apparently qualified U. S.

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[5]While the discussion that follows alludes to the Employer, only, the Alien's arguments in AF 92-93 have been noted and considered with the Employer's arguments. The proposed exhibits that were attached to the appeal have been ignored, however. **Capriccio's Restaurant,** 90 INA 480 (Jan. 7, 1992).

applicant may require more than a single type of attempted contact. BALCA has repeatedly pointed out that an employer who does no more than make unanswered phone calls has not made a reasonable effort to contact the U. S. worker. The panel in one case explained that a certified letter would have been a minimally acceptable additional effort. **Any Phototype, Inc.**, 90 INA 063(May 22, 1991). This viewpoint, which has been upheld consistently in BALCA decisions, also applies in this case. See **Yaron Development Co., Inc.**, 89 INA 178 (Apr. 19, 1991)(*en banc*); **Sierra Canyon School**, 90 INA 410 (Jan. 16, 1992); **C'est Pzazz Industries**, 90 INA 260(Dec. 5, 1991); **Gambino's Restaurant**, 90 INA 320(Sep. 17, 1991).

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of certification under the Act and regulations is affirmed for the reasons hereinabove set forth.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.